Supreme Court, U.S.
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No. 01-921

IN THE

Supreme Court of the United States

GEORGE A. ROSS,

Petitioner,

v.

HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES INTERNATIONAL UNION; ROBERT BAKER, Co-Trustee; and CAROL CARLSON, Co-Trustee,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE AND FACTS

Petitioner George Ross was, at all relevant times, employed at will as an appointed business agent for Local 57 of the Hotel Employees and Restaurant Employees International Union (hereinafter, "HEREIU"). Local 57 is located in Pittsburgh, Pennsylvania.

The HEREIU was a party to a Consent Decree with the United States which provided for the appointment of a federal monitor for the purpose, among others, of eliminating any organized crime influences in the HEREIU and its Local Unions. In November, 1997, the federal monitor recommended to the HEREIU President that a trusteeship be

imposed on Local 57 and the HEREIU President agreed. On January 6, 1998, pursuant to the HEREIU Constitution, a trustee was appointed and the officers of Local 57 were suspended. Ross admitted that the HEREIU had a proper purpose for imposing the trusteeship, testifying that "I do believe that that [the resignation of three officers for knowing association with organized crime figures] is a valid reason for an International to come in and take over."

Although Ross was initially fired by the trustee from his position as appointed business agent, he was reinstated within twenty-four (24) hours and continued to serve in that position for the remainder of the trusteeship. In light of his immediate reinstatement, Ross lost no wages, benefits, or other compensation.

When the trusteeship was terminated and new elections were planned, Ross sought to run for elected office. Ross was declared ineligible because he was delinquent in paying his dues. Ross did not dispute that he was delinquent in paying his dues. Local 57 bylaws limited candidates for office to members in good standing and provided for automatic suspension from membership of members who failed to pay their dues. As the U.S. Department of Labor has recognized, local unions have a legitimate interest in requiring persons who seek to hold union office to comply with bylaw provisions for the payment of dues. 29 C.F.R. § 452.37.

On August 10, 1998, the trusteeship was terminated and new elections were held. The new officers reduced the number of business agents from six to three and did not appoint Ross as a business agent. Ross admitted at trial that the new officers had no obligation to appoint him as a business agent.

Ross had filed two lawsuits, one challenging the trusteeship ("the trusteeship case") and one challenging the

election ("the election case"). The cases were consolidated. The only case appealed to the court of appeals was the trusteeship case and that is the case in which petitioner seeks a writ of certiorari.[1]

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS, DECISIONS OF STATE SUPREME COURTS, OR DECISIONS OF THIS COURT

Petitioner's argument, as articulated in the Petition, is simply that the decision of the Court of Appeals was incorrect. Petitioner identifies none of the considerations set forth in Supreme Court Rule 10 governing review on certiorari. None of those considerations are met in this case.

The decision of the court of appeals is not in conflict with the decision of any other court of appeals on the issue raised. (Rule 10(a)). In fact, the decision of the court of appeals is consistent with decisions of other courts on this issue, as noted by the court of appeals, citing *Gesink v. Grand Lodge, International Ass'n of Machinists and Aerospace Workers*, 831 F.2d 214 (10th Cir. 1987). (Pet. App. at 27a-28a).

Likewise, the decision of the court of appeals is not in conflict with the decision of a state court of last resort. (Rule 10(a)).

The decision of the court of appeals does not conflict with any relevant decision of this Court. (Rule 10(c)). In fact, as the court of appeals set forth at length in its decision, the decision reached is consistent with this Court's decisions

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[1] The petition states that the district court's opinion "dated January 12, 2000 is set forth in the Appendix, p.53a." (Petition at 1). The last page in the petition served on respondents is 51a and neither the petition nor the Appendix contains the referenced decision of the district court.

related to Title I of the Labor Management Reporting and Disclosure Act (hereinafter, LMRDA) in *Finnegan v. Leu*, 456 U.S. 431 (1982) and *Sheet Metal Workers' International Ass'n v. Lynn*, 488 U.S. 347 (1989). (Pet. App. 21a-27a).

Finally, the decision of the court of appeals does not involve an unsettled question of federal law which should be settled by this Court. (Rule 10(c)). The Tenth Circuit in *Gesink* and the Third Circuit in the pending case, with guidance from this Court's decisions in *Finnegan* and *Lynn* relating to the LMRDA, have settled the issue satisfactorily.

Accordingly, since none of the factors for consideration in granting a writ are present in this case, the writ should be denied.

II. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT NO CLAIM FOR INDIVIDUAL DAMAGES WAS AVAILABLE PURSUANT TO TITLE III OF THE LMRDA.

The contention presented by Ross's petition is that the court of appeals incorrectly interpreted section 304 of the LMRDA, 29 U.S.C. § 464, by declining to reverse the district court's decision that Ross had no individual claim to pursue relating to the trusteeship.

Ross contends that "[s]ince the Defendants were using the trusteeship as a tool to harm Ross, he is entitled to be compensated for any losses sustained as the result of that misuse." (Petition at 7). However, Ross admitted at trial that he was immediately reinstated and that "I didn't lose any wages." Accordingly, the individual damages Ross seeks to recover by virtue of the individual cause of action he asks the Court to create are elusive. The "benefit" Ross apparently seeks is that permitting him to pursue his claim "will inure to the benefit of the entire membership by causing the International Union to fully consider the ramifications of its

actions in imposing trusteeships in the future." (Petition at 7-8). Such an amorphous basis for a claim can hardly give rise to standing under any statute, much less section 304.

The petition should be denied because the decision of the court of appeals was correct.

Section 304 provides in pertinent part that, in addition to permitting the Secretary of Labor to bring a civil action relating to a trusteeship, "[a]ny member or subordinate body of a labor organization affected by any violation of this title (except section 301) may bring a civil action in any district court of the United States having jurisdiction of the labor organization for such relief (including injunctions) as may be appropriate." 29 U.S.C. § 464(a). The court determined the question before it to be whether "the individual relief that Ross is seeking is 'appropriate' under Title III." (Pet. App. at 11a).

The court of appeals conducted an exhaustive review of the language and legislative history of the statute and concluded that "[b]y allowing individual members to bring suit rather than the Secretary, Congress intended more avenues for enforcement of the trusteeship provisions, not more types of relief." (Pet. App. at 20a). In addition, the court of appeals found no legislative history supporting an award of any particular relief to an appointed official such as Ross. (*Id.*).

> Nothing in the legislative history of Title III suggests that Congress contemplated an individual bringing suit for compensatory damages arising from the loss of an appointed union position under that title. The statutory scheme of the LMRDA strongly suggests that the individual rights that Ross seeks to vindicate must be redressed under Title I.

(*Id.*).

The court of appeals also found that the decisions of this Court relating to the rights of appointed officials under Title I

of the LMRDA were applicable in evaluating Ross's asserted right pursuant to Title III. The court noted that "the LMRDA did not protect appointed officers [such as Ross] who 'backed the wrong horse,'" (Pet. App. at 21a), and that, like the newly elected officers in *Finnegan v. Leu*, 456 U.S. 431 (1982), "the newly elected officers of Local 57 were free 'to choose a staff whose views were compatible with [their] own,'" (Pet. App. at 22a (citation omitted)). The court of appeals found Ross's position to be "in substantial tension with *Finnegan*" where the Court found that the appointed employee had no Title I claim because, as in this case, "that choice [of appointing officers] was necessarily concomitant to allowing elected officials to implement the programs and leadership that a majority of the union membership had voted for." (Pet. App. at 26a).

The court of appeals found that Ross's asserted Title III claim "may well be an attempt to circumvent the holding in *Finnegan*," and that "nothing in the legislative history of Title III establishes that Congress intended to protect appointed officers like Ross under the circumstances here." (Pet. App. at 26a). The court of appeals found that the rights Ross was seeking to vindicate were Title I rights. (Pet. App. at 27a).

The court of appeals distinguished this Court's decision in *Lynn* on the ground that "Lynn's situation was quite different for he was removed from an *elected* position, and his removal thereby had a direct impact on the democratic governance of the union itself." (Pet. App. at 24a (emphasis in original)). The court of appeals cited this Court's holding that "'a trustee's authority under Title III ordinarily should be construed in a manner consistent with the protections provided in Title I.'" (Pet. App. at 25a). Accordingly, since Ross, as an appointed business agent, had no claim under Title I, he had no claim under Title III.

The court of appeals endorsed the decision of the Tenth Circuit in *Gesink v. Grand Lodge, International Ass'n of*

Machinists and Aerospace Workers, 831 F.2d 214 (10th Cir. 1987), where the court dismissed a local union president's claim pursuant to Title III based on his removal during a trusteeship. The Tenth Circuit held that claims pursuant to Title III should be limited to relief on behalf of the union and that "nothing in the legislative history of Title III indicates an intent to protect the positions of union officers and employees." (Pet. App. at 27a). The court of appeals in this case also relied on the finding by the Sixth Circuit, in *Pope v. Office and Professional Employees International Union*, 74 F.3d 1492 (6th Cir. 1996) that "'Title III of the LMRDA is designed to protect a subordinate union as a whole, whereas Title I . . . is designed to protect the individual rights of the members of the union.'" (Pet. App. at 27a).

The court of appeals held that Ross's claim failed as a matter of law because "Title III does not allow a private cause of action for individual damages flowing from the termination of an appointed employee." (Pet. App. at 34a). The court pointed out that Ross "was not expelled from membership, and he was reinstated to his appointed position within 24 hours of being removed from it." (Pet. App. at 33a). The court of appeals emphasized that Ross did not allege a violation of Title I.

Ross attempts in his petition to distinguish *Finnegan* and *Lynn* as cases involving Title I issues. However, Ross's argument is grounded in neither the statute, the legislative history, nor common sense. There is no basis for concluding that an appointed business agent obtains enhanced status and rights to tenured employment, which he would not have under Title I, simply because a trusteeship is imposed. Since there is no legal basis for attributing an exalted legal status to Ross by virtue of the trusteeship, the courts should decline to legislate and establish rights and remedies where Congress had declined to do so.

The statutory language is clear. Section 304(a) permits a member to bring an action if he belongs to "a subordinate body of a labor organization affected by any violation of this title . . . ." 29 U.S.C. §464(a). The statutory language itself focuses on the effect of the violation on the labor organization and not on the individual member. Clearly, the cause of action created by the statute is in the nature of a derivative action on behalf of the labor organization for relief from the effect on the labor organization of the alleged violations of the trusteeship statutes. The statute provides the court with discretion to craft "appropriate" relief for the labor organization. There is no basis for concluding that an appointed business agent has a claim for individual damages arising from actions by the trustee acting within his powers as trustee.

The petitioner argues that the last sentence of section 304(a) permitting a member to bring an action on behalf of a labor organization affected by a violation of Title III is rendered superfluous by the court of appeals' decision. The petitioner argues that, if members only have rights pursuant to Title I, there is no reason for members to have a right to bring an action under Title III. To the contrary, the statute is very clear that members may bring an action pursuant to Title III ***on behalf of a labor organization*** that is affected by a violation of the trusteeship provisions. The action created by the statute is one brought by an individual member on behalf of the labor organization when the organization may not be able to assert its own rights because it is in the hands of a trustee, parent organization, or persons not sympathetic to the claimed violations of Title III. However, permitting a member to bring such a derivative action does not require the further assumption championed by petitioner that, therefore, a member ought to be permitted to bring an action for individual damages pursuant to Title III, an action not supported by the language, legislative history, or construction of the LMRDA.

The petition cites several cases from lower courts, all of which were distinguished by the court of appeals, and none of which support the petitioner's position.

The petition cites *Higgins v. Hardin*, 644 F.2d 1348 (9th Cir. 1981), in which a union organizer was discharged by the trustee after the international union had failed to follow the proper procedures in imposing the trusteeship. Higgins sued under both Title I and Title III and was awarded back pay. The court in *Higgins* never directly considered the standing of an individual plaintiff to recover under Title III only. The petition's own discussion of *Higgins* admits the equivocal basis for the *Higgins* court's decision, noting that "[f]rom the Court's opinion, it can be ***inferred*** that plaintiff was entitled to all compensatory damages arising from that improper act [imposition of the trusteeship]." (Petition at 11) (emphasis added)).

The court of appeals, following the Tenth Circuit's decision in *Gesink*, 831 F.2d at 216, distinguished *Higgins* on the ground that "[a]lthough the court there assumed that an individual right of action exists, under Title III, it did not directly address the issue." (Pet. App. at 29a). "It never analyzed the legislative history that *Finnegan* and *Lynn* instruct is so important to a proper inquiry. Moreover, *Higgins* was decided before *Finnegan* and *Lynn*, and the *Higgins* court therefore did not have the benefit of the Supreme Court's discussion of the LMRDA contained in those later cases." (*Id.*). *See also Gesink*, 831 F.2d at 216. In addition, *Higgins* is factually distinguishable from this case. Higgins was discharged ***by*** the trustee ***during*** the trusteeship. In this case, Ross was employed during the entire period of the trusteeship and only ceased employment after the newly elected officers decided not to re-appoint him as a business representative.

In *McDonald v. Oliver*, 525 F.2d 1217 (5th Cir.), *cert. denied, Local Union No. 795, Intern. Longshoremen's Ass'n*

v. McDonald, 429 U.S. 817 (1976), a trusteeship was imposed and a new election was held. However, the international refused to enforce the election results and install the officers. The newly elected officers brought suit under Titles I and III. The district court found the election valid and ordered the officers installed and awarded back-pay.

The court of appeals in this case found *McDonald* distinguishable because the relief obtained in that case, the installation of properly elected officers, "confers benefits on the entire union membership." (Pet. App. at 30a). Further, to the extent that Ross argued that *McDonald* supported a claim for individual damages, the court of appeals distinguished *McDonald* on the grounds that McDonald was elected while Ross was appointed, and that *McDonald* was decided prior to the decisions in *Finnegan* and *Lynn*. (*Id.*). "The decisions in *Finnegan* and *Lynn* readily establish the importance of that distinction [elected vs. appointed] and undermine *McDonald* as support for Ross' action under Title III." (*Id.*). Because Ross was an ***appointed*** representative, his employment was subject to the decision of the newly elected officers not to re-appoint him. That decision should be respected because it gives effect to the wishes of union members as expressed through their elected representatives.[2]

Petramale v. Local No. 17 of Laborer's International Union of North America, 671 F.Supp. 261 (S.D.N.Y. 1987), *rev'd in part*, 847 F.2d 1009 (2d Cir. 1988), cited in the

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[2] *McDonald* is further distinguishable because, in this case, the trusteeship lasted just seven months and was presumed valid pursuant to 29 U.S.C. § 464(c). In *McDonald*, to the contrary, the trusteeship was in place for more than two years prior to the election and was presumptively invalid, creating a prima facie violation of Title III.

Further, McDonald, the newly elected president, was deprived of his office during the pendency of the trusteeship. In this case, Ross was employed during the entire period of the trusteeship, which employment ceased only when the newly elected officers declined to re-appoint him.

petition, did not involve a trusteeship nor any aspect of Title III. *Petramale* involved an alleged violation of a member's free speech rights under Title I. *Petramale* provides no guidance regarding the availability of individual claims under Title III and is therefore irrelevant to the petition.

Pruitt v. United Brotherhood of Carpenters and Joiners of America, 659 F.Supp. 1511 (N.D. Ga. 1987), *vacated on other gr'ds*, 893 F.2d 1216 (11th Cir. 1990), cited in the petition, was distinguished by the court of appeals on the ground that "the court was not asked to find a private cause of action for damages under § 304 of Title III." (Pet. App. at 30a). Importantly, Pruitt stated a claim under Title I "based upon his assertion that the trusteeship had precluded him from assuming an ***elected*** position." (Pet. App. at 31a (emphasis added)). *Finnegan* and *Lynn* teach that the policies underlying the LMRDA justify treating elected and appointed officials differently in order to give effect to the legislative goal of fostering union democracy. The court of appeals noted that the district court in *Pruitt* only found that a triable issue existed regarding whether the trusteeship had been maintained to preclude Pruitt from assuming his elected office. (*Id.*).[3]

Pope v. Office and Professional Employees International Union, 74 F.3d 1492 (6th Cir.), *cert. denied*, 519 U.S. 993 (1996), cited by petitioner, is also distinguishable because in that case Pope's union membership was withdrawn without notice or opportunity to be heard. The court of appeals in *Pope* affirmed a verdict in his favor on the ground that Pope, although an appointed officer, had been deprived of his union membership during the trusteeship, thereby reconciling that

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[3] *Pruitt* is also distinguishable because, in that case, it was the ***trustee*** who denied Pruitt his elected office. In this case, petitioner was fully employed during the entire trusteeship and it was the decision of the ***newly elected officers*** that he not be re-appointed to his position after the trusteeship was dissolved.

case with the holdings in *Finnegan*, *Lynn*, and *Gesink*. The court of appeals in this case distinguished *Pope* because Pope alleged that a violation of his Title I rights occurred during the course of a trusteeship. (Pet. App. at 33a). "However, Ross is not alleging a violation of Title I. He was not expelled from membership, and he was reinstated to his appointed position within 24 hours of being removed from it. . . . Ross seeks relief solely under § 304 of Title III." (*Id.*). The court of appeals held:

> Based on the text and legislative history of Title III and the Supreme Court's decisions in *Finnegan* and *Lynn*, we hold that Title III does not allow a private cause of action for individual damages flowing from the termination of an appointed employee. Relief under § 304 must be sought on behalf of the local union organization and the entire membership must reap the benefits.

(Pet. App. at 33a-34a). *Pope* presents a classic Title I claim since Pope was stripped of his membership by the local union without due process. None of this occurred in this case. Ross never lost his membership rights. Accordingly, *Pope* does not support the petition.

Accordingly, since the court of appeals decision was correct on the facts of this case, the writ should be denied.

III. THE RECORD BELOW DOES NOT PROPERLY RAISE THE QUESTION SET FORTH IN THE PETITION.

The question presented in the petition is not properly raised by the record below. This case was decided on a motion for summary judgment, after the case had been tried, without result, to a jury. Accordingly, both the district court and the court of appeals had a complete factual record upon which to base their decisions and were not limited to the allegations of the amended complaint or the pleadings. The question presented in the petition is particularly inappropriate for con-

sideration because the factual assumptions in the question presented are not supported by the record.

First, petitioner Ross suffered no "damage" by virtue of the trusteeship. As petitioner Ross himself admits, he was immediately reinstated to his position as an appointed business agent, even before he filed suit, and continued in that position until the newly elected officers reduced the number of business agents from six to three and did not appoint Ross. Ross lost no time or compensation from his job as an appointed business agent, and, accordingly, has no tangible damages that might be the subject of a claim. Since there are no damages that might be the subject of an action to challenge the continuation of the trusteeship, the question of whether Title III of the LMRDA creates such an action in favor of a union member is hypothetical.

Second, Ross admits that there were adequate grounds for imposition of the trusteeship and only challenges the trusteeship's continuation during the period when it was presumed, by statute, to be valid. 29 U.S.C. § 464(c). The trusteeship in this case was imposed by the International Union at the suggestion of a court-appointed monitor pursuant to a Consent Decree, the purpose of which was to rid the local unions of organized crime influence. Ross admitted at trial that the resignations of the officers and the recommendation of the federal monitor provided adequate grounds for imposition of the trusteeship. In light of the fact that Ross suffered no damages from continuation of the trusteeship and admits that it was imposed for a proper purpose, the issue of whether an individual union member has a claim based on continuation of the trusteeship during the period when it is presumed valid is not a significant or substantial question.[4]

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[4] In the Question Presented for Review and throughout the petition, Ross characterizes the issue as whether he was harmed by "imposition" of

Third, the trusteeship lasted only six months and was terminated with new elections well within the eighteen months during which trusteeships are presumed valid by statute. Given the legal presumption in favor of validity, Ross's admitted lack of damages, and his admission that the trusteeship was imposed for a proper purpose, the question Ross submits for review is unsupported by the record, and is therefore a theoretical or hypothetical question which this Court ought not to agree to decide on these facts.

Fourth, the question presented by the petition is not supported by the record because Ross did not oppose the motion for summary judgment in the district court on the issue which he asks this Court to review. In the district court, Ross, in response to the summary judgment motion, contended that, since the case had previously proceeded to trial, the issue of his standing to bring a Title III claim should not be considered under the legal doctrine of the law of the case. Ross's reliance on the doctrine of the law of the case was rejected by the district court. Not until his appeal, did Ross attempt to defend his standing to bring the action. Although the court of appeals overlooked Ross's waiver of his challenge to the issues raised by the summary judgment motion because the case "raises a question of first impression in this

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the trusteeship. Noting Ross's admission that the trusteeship had been imposed for a proper purpose, *i.e.*, the removal of organized crime associations with the local, the court of appeals re-characterized the issue as a challenge to the maintenance of the trusteeship. At trial, Ross testified that "I do believe that [association of officers with members of organized crime] is a valid reason for an International to come in and take over." (Pet. App. at 41a n. 17). The court of appeals noted that "even if he may have conceded the Trusteeship was established for a legitimate purpose, he clearly insists that it was maintained for an improper purpose, and that he has a cause of action under Title III as a result." (*Id.*). This inconsistency between the issue decided by the court of appeals and the issue presented by Ross's petition further renders this case inappropriate for review.

circuit" (Pet. App. at 9a), the absence of a full and contested litigation of the issue at the district court level renders the question presented by the petition not properly presented for review.

Accordingly, for the reasons set forth above, the question presented by the petition for review is not properly presented based on the record in this case.

IV. PETITIONER'S DISQUALIFICATION AS A CANDIDATE FOR LOCAL UNION OFFICE IS NOT PROPERLY BEFORE THIS COURT.

The district court held that Ross's "election case" was barred because Title IV of the LMRDA provides that the exclusive remedy for challenging an election, including challenges to qualifications of candidates for office, is by complaint to the Secretary of Labor. This is consistent with the decisions of this Court. *See Calhoon v. Harvey*, 379 U.S. 134, 140 (1964). (Pet. App. at 35a n.8).

Ross did not raise this issue as an assignment of error in the court of appeals and does not include it in the question presented for review. (Pet. App. at 36a n. 9 ("Ross does not now challenge . . . the district court's refusal to overturn the union election.")). However, petitioner's brief is replete with conspiracy theories relating to the election and with references to his claim that his delinquency in paying dues was an improper ground for declaring him ineligible for office. Since the lower court held that Ross's claim was barred by the exclusive remedy provisions of Title IV and Ross failed to preserve any appeal from that decision, this issue is not properly before this Court despite Ross's repeated references to it in his petition. Ross may not evade the exclusive jurisdiction of the Secretary of Labor by repeatedly referencing such issue in a case in which Ross's sole legal claim is pursuant to the trusteeship provisions of the

LMRDA. Accordingly, the issue of Ross's ineligibility as a candidate for failure to pay dues is not properly before this Court and should be disregarded in considering the petition.

CONCLUSION

For the reasons set forth more fully above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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